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# The Jurisdiction of the Community Courts Reconsidered

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# The Jurisdiction of the Community Courts Reconsidered

PAUL CRAIG<sup>†</sup>

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## I. INTRODUCTION

In any legal system the jurisdiction of the courts is a topic of significance. This is especially so in relation to the European Union, where judicial authority is divided between the Community courts and those of the Member States. The way in which these courts inter-relate is of importance in both practical and conceptual terms. In practical terms, it can have a profound effect on the efficiency of the judicial regime taken as a whole. In conceptual terms, this relationship can tell us much about the more general nature of the Community legal order.

This article will therefore reconsider the jurisdiction of the Community courts. The inquiry is timely given the need to think more generally about the Community's institutional structure in the light of expansion. There have been two important papers which directly address key issues concerning the Community's judicial architecture. One has been written by those currently in the ECJ and CFI,<sup>1</sup> and will be referred to hereafter as the Courts' paper. The other was produced by a Working Party composed largely of former judges of the ECJ at the behest of the Commission.<sup>2</sup> The Chairman was Ole Due and it will be referred to as the Due Report.

The discussion will be structured in the following manner. There will be an analysis of the central attributes of the present judicial system. This will be followed by a review of the reasons for the increasing case-load borne by the Community courts, and the techniques presently available to limit the number and type of case which they hear. The focus will

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1. THE FUTURE OF THE JUDICIAL SYSTEM OF THE EUROPEAN UNION (PROPOSALS AND REFLECTIONS) (May 1999) [hereinafter THE FUTURE OF THE JUDICIAL SYSTEM].

2. REPORT BY THE WORKING PARTY ON THE FUTURE OF THE EUROPEAN COMMUNITIES' COURT SYSTEM (Jan. 2000) [hereinafter REPORT BY THE WORKING PARTY].

then shift to the aims which should underlie reform of the Community's judicial structure. The bulk of the chapter will analyse the proposals made in the two papers, drawing out the broader implications and consequences of particular jurisdictional reforms. The discussion will conclude with the reception of these proposals by the IGC, and the changes actually made in the Nice Treaty.

## II. CENTRAL ATTRIBUTES OF THE PRESENT SYSTEM

Discussion of the proposals for reform of the Community judicial system requires an understanding of the central attributes of that system.

### A. *The Community Courts*

It is clear that properly understood we have three types of Community Court, not just two: we have the ECJ, the CFI *and* national courts. It is important not to forget the latter when we think of the structure of the Community judicial system. The rationale for inclusion of national courts in this respect is of course that they are enforcers of Community law in their own right, and have been ever since the seminal decisions in *Da Costa*<sup>3</sup> and *CILFIT*.<sup>4</sup> National courts will apply EC law to cases which come before them, either where the ECJ/CFI have already decided the point of law in question, or where the matter is *acte clair* in the sense articulated in *CILFIT*. The ECJ in an earlier paper characterised national courts as "as the courts with general jurisdiction for Community law,"<sup>5</sup> and this characterisation was repeated in the Courts' more recent paper.<sup>6</sup>

The *Da Costa* decision served to enhance the authority of the ECJ's rulings, in the sense that national courts were told to regard such rulings as authoritative on the issues contained therein. This altered the original conception of the relationship between national courts and the ECJ, from one which was essentially bilateral, in which rulings were only of relevance to the national court which requested them, to one which was essentially multilateral, in which ECJ rulings would have an impact on all national courts. It provided the foundation from which the ECJ could construct a more authoritative system of Community law. The decision in the *CILFIT* case meant that those rulings were now to have authority for situations in which the point of law was the same, even though the questions posed in earlier cases were different, and even though the proceedings in which the issue originally arose differed. National courts became enforcers of Community law in their own right. Once an issue of Community law had been determined by the ECJ, national courts could then apply that law without further resort to the ECJ. National courts became part of a Community judicial hierarchy with the ECJ at the apex of the network.

The ECJ's treatment of *acte clair* fits with the preceding analysis. The Court in *CILFIT* could have chosen to deny any place for the *acte clair* doctrine in EC law. This was the view espoused by Advocate General Capotorti.<sup>7</sup> The Court chose not to follow this approach, and instead gave the doctrine limited support, albeit hedged about with a range of

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3. Cases 28-30/62, *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v. Nederlandse Belastingadministratie*, 1963 E.C.R. 31.

4. Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, 1982 E.C.R. 3415.

5. REPORT OF THE COURT OF JUSTICE ON CERTAIN ASPECTS OF THE APPLICATION OF THE TREATY ON EUROPEAN UNION—CONTRIBUTION OF THE COURT OF FIRST INSTANCE FOR THE PURPOSES OF THE 1996 INTERGOVERNMENTAL CONFERENCE ¶ 15 (May 1995).

6. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 24.

7. Case 283/81, 1982 E.C.R. at 3439.

restrictions. Commentators have taken differing views as to what the ECJ intended by casting its judgment in these terms. Some contend that the real objective was to deal a death blow to the concept, through the very range of restrictions imposed thereon. Others argue that the Court's purpose was to legitimate the concept, but to make the national courts more responsible when using it. The effect of the decision was however to leave cases which met the ECJ's conditions to be decided by the national courts. For such clear-cut cases, the national courts functioned as the delegates of the ECJ for the application of Community law, thereby allowing the latter to utilize its time in the resolution of more problematic cases.

In drawing up a list of Community judicial organs we should not forget the seminal role played by the Commission. It may well be argued that, in strict doctrinal terms, the Commission is not a court at all, but more akin to an agency which exercises adjudicative functions. This picture of the Commission is reinforced by its very susceptibility to judicial review. This may well be accepted, but it should not be allowed to mask the underlying reality. If the Commission when exercising its judicial functions is to be regarded as an agency then it is an agency which has enormous power and responsibility within certain key areas of EC law. It is the Commission which has the front-line responsibility for competition policy and state aids. If it did not exercise initial judicial power over these areas then this would have to be reassigned either to another specialist agency or to the CFI. The latter is not a viable option, given the work-load entailed by initial decision-making in the areas of competition and state aids. Indeed this very work-load has been problematic for the Commission itself which has encouraged national courts to take an ever more prominent role in the enforcement of competition law, leaving the Commission time to adjudicate on those cases which raise new issues of principle, or which are especially difficult.

#### *B. The Division of Responsibility between the ECJ and the CFI*

We shall consider in due course the possibility of reforming the jurisdictional competence of the ECJ and the CFI in order to make it more rational and efficient. For the present it should be recognised that the division of jurisdictional responsibility between the two courts has been largely ad hoc. It is well known that the CFI was created to ease the work-load of the ECJ. It was therefore natural to assign it certain types of case which by their very nature had a heavy factual quotient which took up too much time of the ECJ itself. It was for this reason that competition and staff cases were assigned to the CFI. The extension of jurisdictional competence to the CFI over direct actions brought by individuals under Articles 230, 232, and 288, was a further move to try to ease the work-load of the ECJ. The same motive, combined with the idea that the CFI had built up expertise in the areas of competition and intellectual property, led to cases concerning the Community trade mark being assigned to the CFI.

#### *C. The Division of Responsibility between the ECJ/CFI and National Courts*

The division of responsibility between the ECJ/CFI and national courts has been coloured by a number of different factors, two of which stand out and are to some extent in tension.

The main objective has been to confer a broad power on national courts to enforce Community law, since this enhanced the overall effectiveness of EC law in the manner considered above. Hence the encouragement given to national courts to apply Community precedent in cases which come before them without recourse to the ECJ unless there was

need to do so. Hence also the ECJ's insistence that any national court must be able to apply EC law in a case which came before it, and its insistence also that national rules should not be able to hinder or impede this.

This has been tempered by the desire to preserve the uniformity of application and interpretation of EC law. This was the rationale for the *Foto-Frost* decision:<sup>8</sup> while national courts have the ability to declare EC norms to be valid, and whilst they must treat ECJ decisions that a Community norm is invalid as having ergo omnes effect,<sup>9</sup> they cannot themselves declare a Community norm to be invalid, although they can of course now provide some interim relief.<sup>10</sup>

#### *D. The Division of Responsibility between the ECJ/CFI and the Commission*

We have considered thus far the factors which have affected the division of responsibility between the ECJ and CFI, and between both of these courts and national courts. A number of considerations have affected the allocation of power as between the ECJ/CFI and the Commission.

We have already seen that the Commission itself has been under considerable pressure because of its work-load, hence the desire to enlist the further support of national courts. The volume of work in areas such as competition and state aids meant that it would have been impossible for either the ECJ or the CFI to exercise original jurisdiction. Expertise was a further reason for according power to the Commission over such areas. Competition policy involves difficult economic concepts. At the inception of the Treaty it would not have been an easy task for a generalist court, such as the ECJ, to develop the expertise to enable it to flesh out the bare bones of Articles 81 and 82 of the Treaty. There is moreover a less obvious, but important, advantage of according power over these matters to the Commission. Policy in an area such as competition or state aids can be developed either through adjudication or rulemaking. Other things being equal there is clearly an advantage in according power to a body which has the ability both to adjudicate and to make rules, since this thereby maximises the freedom of choice as to how best to develop policy in that particular area. The Commission possesses this dual capacity. It will make the initial adjudication in a competition or state aids case, and can use this as the vehicle through which to develop its thinking about, for example, oligopoly. The Commission can also make rules which have a profound affect on the reach of Articles 81 and 82, as exemplified by the block exemptions which it has made on matters such as exclusive distribution and exclusive dealing.

#### *E. The Central Importance of Preliminary Rulings within the EC Judicial System*

The ECJ and CFI possess jurisdictional competence over actions brought before them in a number of different ways, including direct actions under Articles 226, 230, 232, and 288. There is however little doubt that it is the ECJ's jurisdiction over preliminary rulings under Article 234 which is regarded as the jewel in the Crown of the existing regime. The

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8. Case 314/85, *Firma Foto-Frost v. Hauptzollamt Lubeck-Ost*, 1987 E.C.R. 4199.

9. Case 66/80, *International Chemical Corporation v. Amministrazione delle Finanze dello Stato*, 1981 E.C.R. 1191.

10. Cases C-143/88 and 92/89, *Zuckerfabrik Suderdithmaschen AG v. Hauptzollamt Itzehoe*, 1991 E.C.R. I-415.

preliminary reference procedure enshrined in this Article has been of seminal importance for the development of EC law. There are three reasons why this is so.

First, preliminary references have been the procedural vehicle through which key concepts such as direct effect and supremacy have developed. This is graphically captured by Mancini and Keeling:<sup>11</sup>

If the doctrines of direct effect and supremacy are . . . the "twin pillars of the Community's legal system," the reference procedure laid down in Article 177 must surely be the keystone in the edifice; without it the roof would collapse and the two pillars would be left as a desolate ruin, evocative of the temple at Cape Sounion—beautiful but not of much practical utility.

Secondly, preliminary rulings have not only been the procedural vehicle through which direct effect and supremacy have developed. The very existence of this procedure has been part of the justificatory argument for the existence of direct effect itself. The ECJ has drawn on the existence of the Article 234 procedure to justify the substantive doctrine of direct effect and to justify the extension of that doctrine. This is readily apparent from the ECJ's reasoning in *Van Gend* itself.<sup>12</sup> The ECJ held that the existence of Article 177 indicated that a point concerning the interpretation of EC law could be raised before a national court. There was nothing in the wording of the Article to suggest that the matter could not be raised by an individual litigant, even though the decision whether to refer the matter would of course be made by the national court itself. This said the ECJ provided further evidence that individuals could derive rights from Community law which they could invoke in the national forum. A decade later the ECJ invoked the same argument to justify the extension of direct effect to directives in *Van Duyn*.<sup>13</sup>

Article 177, which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts.

Thirdly, preliminary rulings have been the mechanism through which the supremacy doctrine has been "nationalised." This is in part because the supremacy of Community law has been developed through cases which have arisen through the Article 234 procedure.<sup>14</sup> It is in part because the very structure of this procedure means that the case will start and end in the national courts. To be sure the national court must accept the basic tenets of the supremacy of EC law. However once this has occurred the fact that the supremacy doctrine is applied by and through national courts renders it much more effective than if it had simply been attached to an Article 226 action.

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11. G. Federico Mancini & David T. Keeling, *From CILFIT to ERT: The Constitutional Challenge Facing the European Court*, 11 Y.B. EUR. L. 1, 2-3 (1991).

12. Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

13. Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337, Rec. 12 of judgment.

14. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 1978 E.C.R. 629.

*F. Preliminary Rulings as a Constraint on the EC's Judicial Architecture*

The preliminary ruling procedure is therefore justly regarded as the jewel in the Crown of the ECJ's jurisdiction. It should however also be recognised that the nature of this procedure, as opposed to one which is more appellate in nature, has placed constraints on the way in which the judicial architecture of the Community has developed. It is necessary to be aware of these since they affect the reforms which have been proposed.

The very fact that preliminary rulings take the form of a reference of a question from a national court to the ECJ, while the substance of the case remains for resolution within the national court, means that it is felt by many that there must be a "one stop shop." The questions referred by the national court must go to one and only one Community court. While it would be possible to have questions sent to the CFI with limited rights of appeal to the ECJ the general thinking is that this would be unacceptable because of the time delays thereby involved. Whether this is indeed such an obstacle is not so clear.<sup>15</sup> We shall return to this issue below.

This problem is compounded by the fact that preliminary rulings vary enormously in terms of their importance. If all such cases were of real importance then it would not matter that they should all go to the ECJ for resolution. However many requests for preliminary rulings are of the "Turkey tail or nightdresses" character. Applicants will seek to challenge the validity of Community regulations or decisions. They find it impossible to do so through Article 230 because of the very restrictive standing rules which apply thereunder. The only way in which an applicant can seek to test the validity of such norms is through an indirect action under Article 234. A common scenario is that a national customs authority, or agricultural intervention board, will apply a Community regulation concerning the details of customs classification, agricultural levies and the like to a particular producer. The producer feels that the goods have been wrongly classified, or that the levy is discriminatory, and therefore resists payment. The customs authority, or agricultural intervention board, takes legal action and the applicant argues before the national court that the regulation is invalid, and asks that the relevant questions be referred to the ECJ. A glance through the Community law reports for any one year reveals the number of such cases which are heard by the ECJ. It is of course right and proper that such matters are judicially resolved. It is however far less obvious that the ECJ should be spending its time and resources on such matters.

### III. REASONS FOR INCREASE IN WORK-LOAD OF THE COURT

It is clear that the principal rationale for the ECJ's paper on reform of the Community's judicial system is the work-load problem. It is therefore important to understand the different factors which have led to the increase in the case-load of the ECJ and CFI. Four such factors can be identified, some of which are obvious, others less so.

The first, and most obvious, such factor is enlargement of the Community. The expansion of the EC from 6 to 15 states, with the real prospect of further expansion to 28 states means that there is more business for the Community courts.<sup>16</sup>

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15. The Courts' paper explicitly considers the possibility of two adjudications on preliminary rulings in the context of its discussion of decentralised judicial bodies. *THE FUTURE OF THE JUDICIAL SYSTEM*, *supra* note 1, at 28-29.

16. *REPORT BY THE WORKING PARTY*, *supra* note 2, at 9.



The second rationale for the increase in the case load of the Community courts is that the areas over which the EC has competence have expanded and continue to do so. This means that the range of cases brought before the ECJ and CFI has continued to grow. A further increase in case load is to be expected as a result of:<sup>17</sup> the new Title IV of the EC Treaty dealing with the external aspects of free movement of persons (visas, asylum, immigration and the like); the legislation relating to the third stage of EMU; Title VI of the TEU concerning police and judicial co-operation in criminal matters; and the provisions of a number of Conventions concluded between the states on the basis of the new Article 31 of the TEU.

A third factor leading to the increase in the work-load of the Community courts is the very success of EC harmonization initiatives. It is axiomatic that one of the main aims of the EC is to harmonize laws and thereby facilitate the creation of a truly single market. How difficult it is to get agreement on such harmonization measures depends of course upon the nature of the subject-matter in question and the differences between the existing laws of the Member States. When such a measure is enacted it may well generate new work for the Community judicial system. Any new piece of legislation, whether enacted at Community or national level, will always contain important issues which require judicial clarification. Where the new legislation is of considerable scope and complexity this may well lead to a significant increase in the case load of a court. The introduction of the Community trade mark provides a fitting example. There are approximately 100,000 such applications lodged with the Community authorities in Spain. The CFI has been assigned jurisdiction over the area and will hear challenges to decisions made by the Community trademark authorities. It is estimated that there will be between 200-400 such cases coming before the CFI per annum and this has led the CFI to ask for 6 extra judges, two new panels.

The final factor which has fuelled an increase in the work-load of the ECJ and CFI is rather different in nature. It is the growing awareness of EC law by lawyers. At the inception of the Community few knew much about EC law, and for a long time it remained the preserve of a limited number of specialists. Taking an EC point was regarded as rather unusual, and often seen as a matter of last resort. While it is true that countries have lawyers who specialise in EC law, it is also true that most lawyers will naturally now think about whether there is an EC point in a case which comes before them.

The combined effect of these factors on the work-load of the Community courts were noted in the Courts' paper and in the Due Report. The Courts' paper stressed that the organisational and procedural framework "must be revised to enable the Court of Justice and the Court of First Instance to shorten existing time limits and deal with further increases in the number of cases brought."<sup>18</sup> If this did not occur then there would be delays on a scale which cannot be reconciled with an acceptable level of judicial protection in the Union. The Courts' paper then continued in the following vein.<sup>19</sup>

Furthermore, in the case of the Court of Justice, the extra case-load might well seriously jeopardise the proper accomplishment of its task as a court of last instance which, in addition, has a constitutional role. The Court would then no longer be able to concentrate on its main functions, which are to guarantee respect for the distribution of powers between the Community and its Member States and between the Community institutions, the uniformity and consistency of Community law and to contribute to the harmonious development of the law

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17. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 6-8.

18. *Id.* at 8.

19. *Id.* at 9. See also REPORT BY THE WORKING PARTY, *supra* note 2, at 5-8.

of the Union. Such a failure on the part of the Court would undermine the rule of law on which, as stated in Article 6(1) EU, the Union is founded.

#### IV. CURRENT JUDICIAL MECHANISMS FOR LIMITING CASE-LOAD

It is clear that there are already a number of judicial mechanisms for limiting the number of cases which come before the ECJ/CFI. It is also clear that the juristic devices which are available in this respect differ in relation to the main heads where the Community courts presently have jurisdiction.

In relation to *direct actions contesting the validity of Community norms*, standing requirements are the main control device which apply to such actions brought by private parties. Views may well differ as to whether the existing rules which are applied under Article 230 are justified or not, although it has to be said that most commentators are critical in this respect.<sup>20</sup> This debate is however only of indirect relevance here. The key point is that the existing rules on standing are very tight and therefore it would not be possible to address the work-load problem by making them any tighter since the present rules already preclude direct actions brought by private parties in the great majority of cases.

In relation to *enforcement actions brought by the Commission before the ECJ* under Article 226 the main control mechanism which relates to case-load resides in the discretion which the Commission possesses as to whether it should take a case or not.<sup>21</sup> The number of cases brought under Article 226 is in any event not that great. Given that the Commission has a discretion as to whether to bring a case, and that it chooses to use its scarce resources to fight those cases which it believes to be most significant as judged by a variety of criteria, then there is no real way of alleviating the work-load of the ECJ by reform in this area.

The ECJ does possess certain mechanisms whereby it can limit the number of cases brought before it for a *preliminary ruling under Article 234*. The procedure under Article 234 is based on co-operation between the national court and the ECJ. The early case law indicated that the ECJ would rarely if ever question the factual basis on which the national court referred, and it would often be willing to re-formulate questions posed by national courts where these had been badly framed.<sup>22</sup> However in the seminal *Foglia* jurisprudence<sup>23</sup> the ECJ made it clear that it would make the ultimate decision as to the scope of its own jurisdiction. The ECJ was not simply to be a passive receptor, forced to adjudicate on whatever was placed before it. It asserted control over the suitability of the reference. The decision in the case itself, concerning the allegedly hypothetical nature of the proceedings, was simply one manifestation of this assertion of jurisdictional control. The principle in

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20. PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* ch. 11 (2d. ed. 1998); Arnall, *Private Applicants and the Action for Annulment under Article 173 of the EC Treaty*, 32 C.M.L.R. 7 (1995); Barav, *Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court*, 11 C.M.L.R. 191 (1974); Paul Craig, *Legality, Standing and Substantive Review in Community Law*, 14 O.J.L.S. 507 (1994); Rosa Greaves, *Locus Standi under Article 173 EEC when Seeking Annulment of a Regulation*, 11 EUR. L. REV. 119 (1986); Carol Harlow, *Towards a Theory of Access for the European Court of Justice*, 12 Y.B. EUR. L. 213 (1992); Nanette A.E.M. Neuwahl, *Article 173 Paragraph 4 EC: Past, Present and Possible Future*, 21 EUR. L. REV. 17 (1996); Hjalte Rasmussen, *Why is Article 173 Interpreted against Private Plaintiffs?*, 5 EUR. L. REV. 112 (1980).

21. Richard Rawlings, *Citizen Action and Institutional Attitudes in Commission Enforcement*, 6 EUR. L.J. 4 (2000).

22. CRAIG & DE BURCA, *supra* note 20, at 433–36.

23. Case 104/79, *Pasquale Foglia v. Mariella Novella*, 1980 E.C.R. 745; Case 244/80, *Pasquale Foglia v. Mariella Novello* (No. 2), 1981 E.C.R. 3045.

*Foglia* lay dormant for some considerable time, and attempts to invoke it did not prove markedly successful.<sup>24</sup> However from the early 1990s the ECJ used the *Foglia* principle to decline to give rulings in cases which were hypothetical, where the questions raised were not relevant to the resolution of the substantive action in the national court,<sup>25</sup> where the questions were not articulated clearly enough for the ECJ to be able to give any meaningful legal response, and where the facts were insufficiently clear for the Court to be able to apply the relevant legal rules.<sup>26</sup> The ECJ has now incorporated some of the results of its case law in its *Guidance on References by National Courts for Preliminary Rulings*.<sup>27</sup> Paragraph 6 states that the order for reference should contain a statement of reasons which is succinct but sufficiently complete to give the Court a clear understanding of the factual and legal context of the main action. It should include, in particular a statement of: the essential facts; the relevant national law; the reasons why the national court referred the matter; and a summary of the parties' arguments where appropriate. While the ECJ has therefore exerted greater control over the admissibility of references than hitherto the Court has also continued to make it clear that it will only decline to give a ruling if the issue of EC law on which an interpretation is sought is manifestly inapplicable to the dispute before the national court, or bears no relation to the subject-matter of that action.<sup>28</sup>

The ECJ also has a more indirect way of limiting case load under Article 234, by limiting the intensity of judicial oversight. This is the classic technique used by the ECJ when reviewing cases brought to it under Article 234 to contest the validity of Community acts which cannot be challenged directly through Article 230 because of the limited standing rules. Applicants who wish to challenge the validity of Community action will often have to do so through national courts which will then send the case to the ECJ for a preliminary ruling as to whether, for example, an agricultural measure was disproportionate and hence in breach of Article 34. The ECJ has made it clear that it will not readily find that the challenged Community norm was invalid, more especially in an area where the Commission and Council have broad discretionary power. The applicant may well have to prove that the measure was manifestly disproportionate, or very obviously discriminatory.<sup>29</sup> In one sense this is clearly not a method of control over case-load at all since the ECJ will have to hear the relevant dispute, even if at the end of the day it decides that the measure is valid since the applicant has not been able to prove the requisite degree of illegality. However, in another sense low intensity review can clearly operate as a tool for controlling case load.

24. Case 261/81, *Walter Rau Lebensmittelwerke v. De Smedt PvbA*, 1982 E.C.R. 3961; Case 46/80, *Vinal SpA v. Orbat SpA*, 1981 E.C.R. 77; Case C-150/88, *Eau de Cologne and Parfumerie-Fabrik Glockengasse No 4711 KG v. Provide Srl*, 1989 E.C.R. 3891.

25. Case C-83/91, *Wienand Meilicke v. ADV/ORGA F.A. Meyer AG*, 1992 E.C.R. I-4871; Case C-18/93, *Corsica Ferries Italia Srl v. Corpo dei Piloti del Porto di Genova*, 1994 E.C.R. I-1783; Case C-428/93, *Monin Automobiles-Maison du Deux-Roues*, 1994 E.C.R. I-1707; Case C-134/95, *Unita Socio-Sanitaria Locale No 47 di Biella (USSL) v. Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro (INAIL)*, 1997 E.C.R. I-195; Cases C-320, 328, 329, 337, 338 and 339/94, *Reti Televisive Italiane SpA (RTI) v. Ministero delle Poste e Telecomunicazione*, 1996 E.C.R. I-6471.

26. Cases C-320-322/90, *Telemarsicabruzzo SpA v. Circostel, Ministero delle Poste e Telecomunicazioni and Ministero della Difesa*, 1993 E.C.R. I-393; Case C-157/92, *Banchero*, 1993 E.C.R. I-1085; Case C-386/92, *Monin Automobiles v. France*, 1993 E.C.R. I-2049; Case C-458/93, *Criminal Proceedings Against Saddik*, 1995 E.C.R. I-511; Case C-167/94R, *Grau Gomis*, 1995 E.C.R. I-1023; Case C-2/96, *Criminal Proceedings Against Sunino and Data*, 1996 E.C.R. I-1543; Case C-257/95, *Bresle v. Prefet de la Region Auvergne and Prefet du Puy-de-Dome*, 1996 E.C.R. I-233.

27. *Guidance on References by National Courts for Preliminary Rulings*, [1997] 1 C.M.L.R. 78.

28. Case C-85/95, *Reisdorf v. Finanzamt Koln-West*, 1996 E.C.R. I-6257; Case C-118/94, *Associazione Italiana per il World Wildlife Fund v. Regione Veneto*, 1996 E.C.R. I-1223; Case C-129/94, *Criminal Proceedings Against Bernaldez*, 1996 E.C.R. I-1829; Case C-446/93, *SEIM—Sociedade de Exportao e Importao de Materiais, Ltd v. Subdirector-Geral das Alfandegas*, 1996 E.C.R. I-73.

29. *CRAIG & DE BURCA*, *supra* note 20, at 506-10.

Those who are thinking of challenging the validity of a measure will come to realise that they have to prove something quite extreme before they can succeed. They will therefore desist from bringing the action where it is clear to the applicant and his lawyer that the chances of proving what the Court requires is remote.

These techniques for limiting the case-load under Article 234 have not however served to stem the tide of references coming to the ECJ. The *Foglia* principle, and the case law based upon it, will only serve to exclude a limited number of references. Moreover, national courts will, it is hoped, learn to frame their references better and in that sense there will over time be fewer cases which can be excluded on this ground. In any event references for a preliminary ruling have increased by 85% since 1990, and they now constitute half of the new cases brought before the ECJ.<sup>30</sup>

## V. THE AIMS OF REFORM OF THE JUDICIAL SYSTEM

Before considering the detailed proposals it is important to have some idea of the overall aims of the reform process. The Courts' paper and the Due Report both posit three fundamental requirements which must be taken into account when thinking of the future of the Community's judicial system.<sup>31</sup>

the need to secure the unity of Community law by means of a supreme court;

the need to ensure that the judicial system is transparent, comprehensible and accessible to the public;

the need to dispense justice without unacceptable delay.

These are clearly important aims in any judicial system, and they must be especially applicable in the context of the EC. There are however three other objectives which should also be borne in mind when thinking of reforms to the judicial architecture of the EC.

there should be effective enforcement of Community law;

the system should be structured to ensure that the most important points of law are decided by the ECJ, and that the ECJ is, so far as possible not troubled by the less important cases;

the system should, other things being equal, be as coherent and symmetrical as possible.

It may well not be possible to ensure the perfect fulfilment of all of these objectives. They should nonetheless not be lost sight of when we consider the detailed reforms themselves. It is to these that we should now turn.

## VI. THE REFORM PROPOSALS: AMENDMENTS TO THE RULES OF PROCEDURE

Both the Courts' paper and the Due Report consider a number of changes which could be adopted by the Council now, without the need for the adoption of any Treaty amendment. The general objective is to "introduce greater flexibility in the application of the Rules of

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30. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 5.

31. *Id.*, *supra* note 1, at 18; REPORT BY THE WORKING PARTY, *supra* note 2, at 10.

Procedure, so as to enable the adaptation of the procedures to the degree of complexity and urgency of each case.”<sup>32</sup> These proposals are to be welcomed. While they deal with points of procedural detail they are important nonetheless.

#### A. *Recourse to Accelerated Procedures*

The object of this proposal is to modify the existing Rules of Procedure to enable the ECJ to deal more expeditiously with cases which require speedy resolution.<sup>33</sup> At present neither the Statute of the Court of Justice, nor its Rules of Procedure, allow for such an accelerated procedure whereby the ECJ could deal with certain cases under a separate procedure. The closest that the existing rules come to providing for this is in Article 55(2) of the Rules of Procedure, which enables the President of the ECJ to order that a particular case be accorded priority over other cases. This does not however empower the ECJ to dispense with certain procedural steps. The proposal is therefore to include in the Rules of Procedure a provision allowing an accelerated procedure to be applied in cases of manifest urgency. This would then allow certain of the normal procedural steps to be omitted or accelerated depending on the nature of the case. A similar power would apply in relation to cases which come before the CFI.

#### B. *Changes in the Oral Procedure*

Oral hearings are valued by the parties, but they can also take up a considerable amount of time. The Court of Justice is particularly concerned to ensure that the “hearing does not become a ritual where the parties concerned merely repeat word for word the arguments which they have already presented during the written procedure.”<sup>34</sup> It therefore proposes that Articles 44a and 104(4) of the Rules of Procedure should provide that a hearing is to take place “either if the Court so decides of its own motion or if a reasoned application is made by one of those parties or one of the persons referred to in Article 20 of the EC Statute of the Court of Justice, setting out the points on which that party or person wishes to be heard.”<sup>35</sup>

#### C. *Directions and Information*

The third of the procedural proposals made in the Courts’ paper draws on powers possessed by the European Court of Human Rights. The ECJ wishes to have the power to issue practice directions relating to matters such as the holding of hearings and the filing of pleadings. It also advocates that the Judge-Rapporteur, in consultation with the Advocate General, should be able to request that the parties submit factual information or other material which is felt to be relevant to the case.<sup>36</sup>

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32. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 10.

33. *Id.* at 11–12.

34. *Id.* at 11.

35. *Id.* at 12.

36. *Id.* at 12.

#### D. *Preliminary Rulings*

We have already seen the steep rise in the number of requests for preliminary rulings. It is therefore unsurprising that the ECJ should propose procedural reforms which will serve to expedite the resolution of such cases. One such reform is an amendment to the Rules of Procedure whereby national courts could be asked to clarify matters where the questions which they have referred provide insufficient information to enable the ECJ to understand the point of law which has been raised. The other proposal is equally interesting. It is that Article 104 of the Rules of Procedure should be modified to allow the ECJ to give a preliminary ruling by order where the question raised is simple, and the answer straightforward, or where the question does not, having regard to the existing case law, raise any new issue.<sup>37</sup> It has moreover been suggested in the Due Report<sup>38</sup> that the terms of the information note concerning preliminary references issued by the ECJ<sup>39</sup> should be incorporated within the Rules of Procedure, and that compliance therewith should be mandatory. Requests which did not so comply would be rejected.

#### E. *The Power to Amend the Rules of Procedure*

The proposals considered thus far are clearly sensible and could, as stated above, be accomplished without any amendments to the actual Treaties. Changes to the Rules of Procedure require unanimous approval by the Council.<sup>40</sup> All of the proposals set out above must therefore pass this hurdle if they are to become legally effective. The ECJ has been pressing for greater autonomy over its Rules of Procedure for some time. It repeats this call in the Courts' paper on reform of the judicial architecture of the Community. The ECJ points out that securing unanimity in an enlarged Community which has in excess of twenty members may well paralyse the process of amending the Rules of Procedure. It proposes that the Treaty be amended to allow both the ECJ and the CFI to adopt their own Rules of Procedure. If this should prove to be too revolutionary a proposition for the Member States, that the Treaty be amended so that the Rules of Procedure could be changed by qualified majority within the Council.<sup>41</sup>

### VII. THE REFORM PROPOSALS: THE COMPOSITION OF THE ECJ AND THE CFI

#### A. *The ECJ*

The expansion of the EC to a Community of 15 Member States, with the prospect of further expansion to 20 or 25, has strained the existing decision-making structure. It is accepted that institutional reform is required and there was an expectation that this would be addressed in the Treaty of Amsterdam. This did not occur, but broader institutional reform is now being considered in detail by the Community institutions. One manifestation of the strains caused by expansion of the EC is to be found in the composition of the ECJ. While

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37. *Id.* at 13.

38. REPORT BY THE WORKING PARTY, *supra* note 2, at 17.

39. Guidance on References by National Courts for Preliminary Rulings, [1997] 1 C.M.L.R. 78.

40. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, arts. 225, 245, O.J. (C 340) 3 (1997).

41. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 15.

the connection between nationality and membership of the ECJ is not stipulated in the Treaty, it has always been accepted that there should be one judge from each Member State. In an earlier paper, prepared for the negotiations which led to the Treaty of Amsterdam, the ECJ addressed the two considerations which are of paramount importance in this context.<sup>42</sup>

On the one hand, any significant increase in the number of judges might mean that the plenary session of the Court would cross the invisible boundary between a collegiate court and a deliberative assembly. Moreover, as the great majority of cases would be heard by Chambers, this increase could pose a threat to the consistency of the case law.

On the other hand, the presence of members from all the national legal systems in the Court is undoubtedly conducive to harmonious development of Community case-law, taking into account concepts regarded as fundamental in the various Member States and thus enhancing the acceptability of the solutions arrived at. It may also be considered that the presence of a judge from each Member State enhances the legitimacy of the Court.

There is little doubt that in political terms the continuance of the status quo whereby each Member State has a judge on the ECJ represents the easiest option, quite simply because any shift from that position would require the articulation of new criteria to govern appointments. The Due Report does indeed assume that the existing system will remain for the foreseeable future.<sup>43</sup> It does however recognise that plenary sessions could not insist of all the judges of the ECJ, the suggestion being that such sessions should consist of just over half of the Court's membership.<sup>44</sup> The role of the Presidents of Chambers would also have to be enhanced to ensure consistency between rulings of Chambers in an enlarged ECJ.<sup>45</sup> A further suggestion made in the Report is that the opinion of the Advocate General should only be sought in important cases.<sup>46</sup>

It may nonetheless be doubted whether the present policy could or should continue in a Community of twenty eight Member States. Analogies which are drawn with the membership of the European Court of Human Rights are not particularly helpful, given the very different nature and objectives of the EC and the European Convention of Human Rights. If it were decided to limit the number of judges on the ECJ then two important issues would have to be addressed.

A decision would have to be made as to the upper limit on the number of judges in the ECJ. There would then have to be a decision as to how the judges were chosen. It would clearly be unacceptable for an existing Member State to have any "vested right" that a judge should be appointed from its country. Various options are open in this respect. There could be a rotation system whereby a judge from a Member State was appointed for a particular period of time. There could, at the other end of the scale, be an open competition for appointments to the ECJ, with those who were successful holding office for a limited period of time. There are doubtless many other possible ways in which appointments could be made.

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42. Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union—Contribution of the Court of First Instance for the Purposes of the 1996 Intergovernmental Conference ¶ 16 (May 1995).

43. REPORT BY THE WORKING PARTY, *supra* note 2, at 46.

44. *Id.* at 46–47.

45. *Id.* at 47.

46. *Id.* at 48–49.

### B. *The CFI*

The Courts' paper also considers the composition of the CFI. We have already seen that the work-load of the CFI is set to increase as a result of cases concerning the Community trade mark. The possible attribution to the CFI of jurisdiction in the field of patents will necessitate a further increase in personnel, and this will also be necessary if the CFI does become a more general court of first instance in the manner to be discussed below.

Increasing the number of judges in the CFI may raise budgetary problems within the more general Community, but it does not generate the same issues of principle as does an increase in the judges within the ECJ. This is recognised in the Courts' paper, where it is said that although the "increase in the number of Chambers would necessitate additional measures for the co-ordination of the case-law, the intervention of the Court of Justice as the court of last instance make it possible to ensure its unity."<sup>47</sup> Nor is the link between nationality and judges in the CFI as important as it is in the ECJ. In any event the number of judges required for the CFI means that it will be possible, if it is felt desirable, for there to be judges from each Member State.

The CFI works in Chambers and this can be used to accommodate the need for subject-matter specialisation. Such specialised Chambers operating within the CFI seems preferable to separate specialist courts. Individual members of the CFI could be assigned to a specialist Chamber for a period of time in order to gain expertise in that area, and there could be a rolling system whereby the judges start and finish date was staggered to ensure continuity.

## VIII. THE REFORM PROPOSALS:

### THE CFI AS GENERAL FIRST INSTANCE COURT IN DIRECT ACTIONS?

The jurisdiction of the CFI has, as seen above, grown in an ad hoc manner. Heads of jurisdiction have been given to it primarily to relieve the work-load of the ECJ itself, hence the assignment of staff cases and competition cases to the CFI. The transfer of all direct actions brought by non-privileged applicants was fuelled by similar concerns. The future role and jurisdiction of the CFI is of central importance to the overall judicial architecture of the Community. One objective of reform must be to achieve a system which is as coherent as possible.

It is therefore somewhat surprising that the Courts' paper is both brief and hesitant about the possible transfer of further competence to the CFI to hear direct actions. Two paragraphs are devoted to the matter. We are told that there are no grounds at present for proposing the transfer of any heads of jurisdiction over and above those whose transfer has already been proposed by the ECJ. We are then told that "the possibility cannot be ruled out that it may become necessary, if the volume of cases continues to grow, to review the basis on which jurisdiction is allocated between the two Community courts and to transfer further heads of jurisdiction to the Court of First Instance."<sup>48</sup> There may well be "political" reasons for being circumspect about this matter, since the Member States may be resistant to suggestions that direct actions in which they are involved should be heard by the CFI rather than the ECJ.

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47. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 20.

48. *Id.* at 21.



The Due Report is more forthcoming in this respect.<sup>49</sup> Its starting point is that the CFI should, as a matter of principle, be the first judicial forum for direct actions, including review for legality and compensation. The CFI's jurisdiction would include actions brought by a Member State or Community institution. This principle was then qualified in the Report such that direct actions involving matters of urgency and importance would be assigned to the ECJ.<sup>50</sup> Only those cases where a rapid judgment was essential to avoid serious problems in the proper functioning of the Community institutions would fall into this category.<sup>51</sup>

The thrust of the Due Report's proposal is to be welcomed. There is a strong case for rationalising the present regime and making it more coherent by transforming the CFI into a *general first instance court in direct actions*. We should move away from the idea that the CFI is a court primarily for technical or factually complex cases. We should not accept that the jurisdiction of the CFI is destined forever to remain eclectic and ad hoc. The CFI is already the first instance court for direct actions involving non-privileged applicants who seek to challenge the validity of Community norms. Its jurisdiction should be extended to enable it to hear all direct actions under Articles 230, or 232, even where the case is brought by a privileged applicant such as the Council, Commission or a Member State, or by a quasi-privileged applicant such as the European Parliament or the European Central Bank. It would also be desirable if the CFI could operate as a first instance court in enforcement actions brought under Article 226. The Member States may however be particularly resistant to a change which would mean that they could be sued before the CFI for non-compliance with Community obligations, rather than before the ECJ itself. This should not dissuade us from making the CFI a general court of first instance in direct actions under Articles 230, and 232. There should of course be the possibility of appeal to the ECJ where the case raised a general point of Community law importance.<sup>52</sup>

The vision of the CFI as general first instance court in direct actions does moreover fit well with other developments in the general regime of Community adjudication. To an increasing extent cases which come before the Community courts will already have been the subject of some form of adjudication. This has always been the case in the context of competition and state aids where the Commission itself will have given a formal, legally binding decision on the matter which the parties can challenge before the CFI. The development of a specialist agency in the context of trade marks is a further move in the same direction. There is now a proposal that staff cases should be handled by inter-institutional tribunals composed of lawyers plus assessors. They would be entrusted with the task of conciliation and, where necessary, of ruling on disputes.<sup>53</sup> Such rulings could be challenged before the CFI, with the possibility of a further, limited right of challenge before the ECJ. Any recourse to the ECJ in such cases would, however, be subject to a very strict filtering procedure. It would be for the parties to lodge an application which the ECJ would rule on without *inter partes* proceedings, before an appeal could be made.<sup>54</sup>

If we put together these ideas then a rational division of jurisdiction begins to emerge. The CFI should become the general court of first instance in direct actions irrespective of the nature of the applicant. There should be limited rights of appeal to the ECJ. The

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49. REPORT BY THE WORKING PARTY, *supra* note 2, at 23–29.

50. *Id.* at 24–25.

51. *Id.* at 25. The Report makes it clear that actions under Article 226 would fall within this category.

52. A filter for appeals from the CFI to the ECJ is part of the proposals made in the Due Report. *Id.* at 28.

53. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 17; REPORT BY THE WORKING PARTY, *supra* note 2, at 30–31.

54. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 16; REPORT BY THE WORKING PARTY, *supra* note 2, at 28–29.

criterion suggested in the Due Report is that there must be a point of law of major importance either for the development of Community law, or for the protection of individual rights. A Chamber of three judges from the ECJ would consider requests for appeal against a ruling of the CFI.<sup>55</sup> In cases where there has been a prior adjudication on the matter by the Commission or some other specialist agency, then the decision of that body should be open to challenge before the CFI. The Due Report proposes that in these areas the CFI should in principle be the final court of appeal, subject only to an appeal to the ECJ at the behest of the Commission where there was a point of general legal interest.<sup>56</sup>

## IX. THE REFORM PROPOSALS: PRELIMINARY RULINGS

We have already seen the steep rise in the number of references for preliminary rulings which have come before the ECJ: 85% since 1990, with an increase of 10% in 1998 as compared with the previous year.<sup>57</sup> Such cases now account for more than half of the new cases brought before the ECJ, 264 references out of 485 cases. The Courts' paper carries a stark warning of the need for reform.<sup>58</sup>

The constant growth in the number of references for preliminary rulings emanating from courts and tribunals of the Member States carries with it a serious risk that the Court of Justice will be overwhelmed by its case-load. If current trends continue without any reform of the machinery for dealing with cases, not only will proceedings become more protracted, to the detriment of the proper working of the preliminary ruling system, but the Court of Justice will also be obliged to conduct its deliberations with such dispatch that it will no longer be able to apply to cases the thorough consideration necessary for it to give a useful reply to the questions referred.

It is highly likely that the impact of its decisions will diminish as their number increases and as they deal more frequently with questions of secondary importance or of interest only in the context of the case concerned.

The nature and scale of the problem are therefore clear. Both the Courts' paper and the Due Report consider different ways in which this problem could be tackled.

### A. *Limitation of the National Courts Empowered to Make a Reference*

There is clearly a "precedent" for a reform of this kind and it is to be found in Articles 61–69, the new Title IV of the EC Treaty, dealing with "Visas, Asylum, Immigration and Other Policies Concerning the Free Movement of Persons." These matters were, prior to the Treaty of Amsterdam, dealt with in Pillar 3, concerning Justice and Home Affairs. The Article 234 procedure has been modified in its application in relation to Title IV. Article 68 stipulates that a preliminary ruling can only be sought by a national court or tribunal against whose decisions there is no judicial remedy in national law, as opposed to the normal

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55. REPORT BY THE WORKING PARTY, *supra* note 2, at 28–29.

56. *Id.* at 29–35.

57. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 5.

58. *Id.* at 22.

position under Article 234 whereby any such court or tribunal has a discretion to seek a reference.<sup>59</sup>

Notwithstanding the existence of this precedent the Courts' paper and the Due Report come down firmly against any general extension of this idea as a method of limiting preliminary rulings.<sup>60</sup> Nor is this surprising. The ability of any national court or tribunal to refer a question to the ECJ has been central to the development of Community law in both practical and conceptual terms.

In practical terms, it has been common for cases which raise important points of EC law to have arisen on references from lower level national courts. To limit the ability to refer to a court of last resort would result in cases being fought to the apex of national judicial systems merely to seek a referral to the ECJ. Many applicants might not be able to afford such lengthy proceedings at the national level, and therefore be dissuaded from persisting with the argument based on EC law. Furthermore, the "uniform application of Community law frequently depends on the answer to a question of interpretation raised before a national court not having to await the outcome of appeal proceedings but being given by the Court of Justice at the outset, so that the case law can become established at an early stage in the Member States of the Union."<sup>61</sup>

In conceptual terms, the ability of any national court or tribunal to refer has been of importance in emphasising the penetration of EC law to all points of the national legal system. It is of course true that even if references were limited to courts of last resort, lower courts would still have the ability to apply existing precedent of the Community courts. The fact that any national court or tribunal can refer does however serve to emphasise that individuals can rely on their directly effective Community rights at any point in the national legal system. If the lower level national court is unsure about the interpretation of a point of EC law it can make a reference on that issue itself without the need for approval from any higher national court. It should not moreover be forgotten that preserving the ability of any national court to refer acts as an important safeguard against the possibility that the court of final resort might be "conservative or recalcitrant" and hence reluctant to refer even where this is clearly warranted on the facts of the particular case.

## B. *The Introduction of a Filtering Mechanism*

Another way in which the volume of preliminary rulings might be reduced would be to introduce a filtering mechanism which limited the types of cases heard by the ECJ. There are three different variants of a filtering mechanism and these must be discussed separately since different policy considerations apply to each.

### 1. A Filter Based on the Novelty, Complexity or Importance of the Question

The Courts' paper points to two advantages which such a filtering mechanism would have. From the national perspective "such a filtering system would prompt national courts and tribunals to exercise selectivity in choosing which questions to refer, and would thus

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59. Article 68(3) also provides that the Council, Commission or a Member State can request the ECJ to give a ruling on a question of interpretation arising under Title IV, or acts of the institutions based on this Title. Such rulings do not apply to judgments of national courts etc which have become *res judicata*.

60. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 23-24; REPORT BY THE WORKING PARTY, *supra* note 2, at 12-13.

61. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 24.

encourage them to exercise yet more fully their functions as Community courts of general jurisdiction.”<sup>62</sup> From the EC’s perspective “the existence of a filtering mechanism would enable the Court of Justice to concentrate wholly upon questions which are fundamental from the point of view of the uniformity and development of Community law.”<sup>63</sup>

The Due Report advocates some constraints of this kind. National courts should, it said, be encouraged to be bolder in applying Community law themselves.<sup>64</sup> The Report recommends amendment to Article 234 so that it is made clear that, subject to the power to refer, national courts are to be regarded as having general jurisdiction over matters of EC law. It suggests that lower national courts should consider both the importance of the question in terms of Community law, and whether there is reasonable doubt about the answer, before referring. National courts of final resort should moreover only be obliged to refer on questions which are “sufficiently important for Community law,” and where there is still “reasonable doubt” after examination by lower courts. The Report is however equivocal as to whether such factors should merely be taken into account by national courts in deciding when to refer, or whether they should operate as a more substantive bar on the cases which can be referred, the application of which is decided by the ECJ itself. The Report appears to incline towards the former. This reading is reinforced by the fact that the Report at a later stage comes out explicitly against giving the ECJ itself the power to select those questions which it considered were sufficiently important for Community law.<sup>65</sup> Whether this position is sustainable may however be doubted. Let us imagine that Article 234 is reformulated, as suggested in the Due Report.<sup>66</sup> The “importance issue” and the “reasonable doubt issues” would then be factors to be taken into account by a national court in deciding whether to refer. The interpretation of these factors would then be a matter of Community law, to be decided on ultimately by the ECJ. This does indeed seem to be recognised, since the Report states it will be for the ECJ to determine the precise scope which should be given to the “importance” or “significance” issue.<sup>67</sup>

There are however two problems with a filtering system of this nature, one of which is immediately apparent, the other less so.

One problem is that such a mechanism might distort the judicial co-operation which has long been regarded as a central feature of the Article 234 procedure: the ECJ will answer any question referred to it. It is true that the ECJ has, through the *Foglia* ruling, and the cases decided thereafter, made it clear that it will not be forced to accept any reference sent to it by the national courts. Such references must fulfil the conditions of admissibility laid down in that jurisprudence, and the Courts’ paper acknowledges the continued necessity for satisfying such conditions.<sup>68</sup> It should however be acknowledged that the introduction of a filtering mechanism of the kind under consideration here would entail a limitation on the ability of the national courts to refer which has not existed hitherto. The *Foglia* ruling, important though it is, only provides the foundation for declining to hear a case where it is hypothetical, where the facts are insufficiently clear, or where the question of law does not arise on the facts of the case. Under the filtering mechanism being considered here questions which were clear, well-framed, of current relevance and backed up by adequate factual findings could be rejected on the ground that the question posed was not sufficiently important to warrant the time of the ECJ. In the Courts’ paper there is a concern that

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62. *Id.* at 24.

63. *Id.* at 25.

64. REPORT BY THE WORKING PARTY, *supra* note 2, at 14–15.

65. *Id.* at 21.

66. *Id.* at 53–54.

67. *Id.* at 15.

68. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 25, ¶ 4.

“national courts and tribunals might well refrain from referring questions to the Court of Justice, in order to avoid the risk of their references being rejected for lack of interest”<sup>69</sup> and that this could jeopardise the machinery for ensuring that Community law is interpreted uniformly throughout the Member States.

There is another problem with this filtering mechanism which is not mentioned in the Courts’ paper or in the Due Report. Those who are in favour of such a system commonly point to legal systems such as that in the USA where the Supreme Court will decide which cases it is willing to hear. There is no doubt that the Supreme Court uses this power to exercise control over the size of its docket and the types of cases it wants to hear. It is for this reason that commentators in the EC look with interest at such a system since it seems to offer a way of limiting the ECJ’s case-load, thereby allowing it to concentrate its energies on matters of real importance for the Community.

There is much to be said for the US system. It is however mistaken to believe that it can be directly copied in the EC. The crucial difference is that the US is an appellate system, and the EC is a referral system. A moment’s reflection will reveal why this is of such importance in this context. In the USA if the Supreme Court declines to hear a case there will be a decision on the point of federal or constitutional law which is in issue.<sup>70</sup> It is precisely because the system is appellate that a decision on the case will have been reached by a lower court which one of the parties will then seek to have overturned by the Supreme Court. The situation in the EC is markedly different. The national court has not decided the case. It has referred a question which has arisen in the case for resolution by the ECJ. If the ECJ declines to answer the question on the ground that it is not sufficiently important or novel to warrant its time then there is no decision by a Community court on the question at all. This places the national court in a difficult position. It is of course true that the national court should apply existing Community law precedent where that exists. It is true also that the national court should decide the matter for itself if the question can be regarded as *acte clair* within the confines laid down in the *CILFIT* case. The premise behind the filtering idea is however that the ECJ may decline to take a reference where there is no existing precedent, and where the matter is not *acte clair*. In such situations there are only two options logically open to the national court.

It could attempt to decide the matter of EC law for itself. If this were regarded as acceptable it would mean that the role of national courts as Community courts of general jurisdiction would have been expanded. We would be accepting that national courts could apply EC law in three situations: where there is a Community law precedent, where the matter is *acte clair*, or where the ECJ itself has declined to take the case.

The national court could alternatively decline to decide the EC point one way or the other. The effect on the substantive outcome of the case would be that the party who sought to rely on the point of EC law would be unable to do so, and the case would be decided on the assumption that this point was unproven. Thus, if a party sought to *resile* from a contract on the ground that it contravened Article 81, the claim would fail since the national court would be unwilling to decide the legal issue in favour of the applicant, the legal consequence being that the contract was still binding.

The application of a filtering idea within the context of the referral system as it operates in the EC is therefore more problematic than it is within the context of an appellate system, more especially one where there is a tier of federal appellate courts below the

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69. *Id.* at 25.

70. This will commonly be given by a lower tier federal court, either a federal court of appeals or a federal district court, or perhaps by a state supreme court.

supreme court. This does not mean that the idea should be ruled out. It does mean that the analogies drawn from appellate systems must be treated with caution. It also means that if the EC were to experiment with this idea then it would be incumbent on the ECJ to give some real guidance to the national courts as to which of the two options mentioned above they should be adopting. There are of course problems with both options. If we opt for the former, and encourage national courts to decide such points for themselves, then we risk undermining the uniformity of application of EC law. If we opt for the latter, and accept that national courts can decline to decide the EC point one way or the other, then we are de facto accepting that EC law can be ignored in such instances. While there are therefore problems with both of these options the former is nonetheless to be preferred. It is better that EC law be applied to the instant case, albeit with the possibility that the national courts might err or differ in their view, than that EC law should be ignored. It should not moreover be forgotten that the dangers of lack of uniformity attendant upon this option are less dramatic than might have initially appeared. This is because the filtering mechanism is designed, as the Courts' paper makes clear, "to weed out at a preliminary stage cases of lesser importance from the point of view of the uniformity and development of Community law."<sup>71</sup> Thus cases left for resolution by national courts which the ECJ declined to hear pursuant to a filtering mechanism would, by definition, be those where uniformity of view was not of paramount importance. It should also be recognised that if it transpired that differences of view between national courts on a matter which the ECJ had initially declined to hear became a reality and were problematic, then a reference in a later case could always be possible. The ECJ would, in such circumstances, be inclined to accept such a reference.<sup>72</sup>

## 2. The National Court Proposes an Answer to the Question

Another way of limiting the case-load of preliminary rulings which the ECJ has to deal with would be for the national court to include in its reference a proposed reply to the question referred. The advantages of such a system are said in the Courts' paper to be that it would "lessen the adverse effect of the filtering mechanism on the co-operation between the national court and the Court of Justice, while the proposed reply could at the same time serve as the basis for deciding which questions need to be answered by the Court of Justice and which can be answered in the terms indicated."<sup>73</sup> A similar proposal has been advanced in the Due Report which states that national courts should be encouraged, though not obliged, to include in the preliminary questions reasoned grounds for the answers which the national court considers to be most appropriate. Where the ECJ concurs with the national court it could reply, specifying its reasoning by reference to the reasons given by the national court.<sup>74</sup>

Neither the Courts' paper, nor the Due Report, give further consideration to this option. There are however difficulties with this proposal. Most national courts and tribunals are not specialists in EC law. It is one thing for the national court or tribunal to identify a question which it believes is necessary for the resolution of the case before it. It is another thing entirely to be able to provide an answer to that question. The latter will at the very least require an expenditure of time and resources at the national level by courts and tribunals many of whom may be ill-equipped for the type of inquiry demanded of them. It is

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71. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 24.

72. REPORT BY THE WORKING PARTY, *supra* note 2, at 16.

73. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 25-26.

74. REPORT BY THE WORKING PARTY, *supra* note 2, at 18.

of course true that higher level national courts may well be able to furnish some answer to the question posed. It should nonetheless be recognised that the proposal being considered here would transform the task faced by such courts. There would have to be detailed argument before the national court of the EC issues involved in the case in order to provide the judge with the requisite material from which to give an answer to the question posed.

Nor is it clear that this proposal would in reality achieve its objective. We should remember that the objective is to relieve the ECJ of some of its case-load burden. Yet even if national courts are required or encouraged to provide an answer to the question posed, the ECJ will still have to give the matter some detailed consideration. This will be necessary in order to decide whether the question really can be answered in the terms indicated by the national court, or whether it needs to be answered afresh by the ECJ.

### 3. Towards an Appellate System

A more radical option is considered in the Courts' paper, which has the effect of transforming the present system from one which is reference based, to one which is more appellate in nature.<sup>75</sup>

A more radical variant of the system would be to alter the preliminary ruling procedure so that national courts which are not bound to refer questions to the Court of Justice would be required, before making any reference, first to give judgment in cases raising questions concerning the interpretation of Community law. It would then be open to any party to the proceedings to request the national court to forward its judgment to the Court of Justice and to make a reference for a ruling on those points of Community law in respect of which that party contests the validity of the judgment given. This would give the Court of Justice the opportunity of assessing, at the filtering stage, whether it needed to give its own ruling on the interpretation of Community law arrived at in the contested judgment.

Such a procedure, resembling an appeal in cassation, would facilitate the task of the Court of Justice. It would enable the Court to give its ruling on the reference in full knowledge of the national context, both factual and legal, in which the points of Community law raised in the case in question fall to be interpreted.

This proposal is interesting and has far-reaching implications. The Due Report was strongly opposed to such a change, stating that "such a proposal would debase the entire system of cooperation established by the Treaties between national courts and the Court of Justice."<sup>76</sup>

I shall begin by examining the difficulties attendant upon this change, and then consider the advantages of taking such a step.

The first point to make about this proposal is a repetition of the point made about the previous option. To require national courts or tribunals to decide the point of EC law in issue would be to impose a burden on them which many lower tier courts or tribunals would find difficult to discharge.

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75. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 26.

76. REPORT BY THE WORKING PARTY, *supra* note 2, at 13.

The second point is that the proposal is unlikely to achieve the objective of limiting the case-load of the ECJ. There would, as acknowledged in the Courts' paper,<sup>77</sup> always be an incentive on the party which had lost the case before the national court to seek a reference to the ECJ, if only to defer enforcement of the judgment.

Thirdly, it is clear that this proposal would require amendment to the Treaty. Article 234 is framed in terms of a national court requesting a ruling from the ECJ where the national court considers that a decision on the question is necessary to enable it to give judgment. Under the proposal set out above this criterion would, by definition, not be met. The national court would already have given its judgment, including on the points of EC law. Reference to the ECJ would happen thereafter at the behest of the parties. The very language of preliminary ruling would be inappropriate under this new regime.

Fourthly, if we take this proposal at its face value then it would seem to involve overruling *Foto-Frost*.<sup>78</sup> A number of the cases which arise in national courts do not seek to challenge the compatibility of national law with Community law. The object is rather to challenge the validity of Community norms which cannot be challenged under Article 230 because the applicant will not have standing. *Foto-Frost* is authority for the proposition that national courts are not empowered to declare a Community norm to be invalid, although they can find that it is valid. The proposal being considered here is framed in terms of the national court giving judgment on the case, including the points of EC law involved therein, which can then be contested before the ECJ if one of the parties so desires. Where the case does concern an indirect challenge to the validity of a Community law norm, then it would seem to follow from this proposal that the national court could, if it felt that it was legally warranted, give a judgment that the Community norm was invalid, which could then be contested before the ECJ.

Fifthly, there is a crucial ambiguity in the formulation of the proposal in the Courts' paper. The extract quoted above is framed in terms of a party to the proceedings "requesting" the national court to refer its judgment to the ECJ, in order that the latter can rule on those points of Community law when the correctness of the national court's judgment is contested. Later on the same page the Courts' paper talks in terms of the parties to an action being able to "require" the national court to make a reference.<sup>79</sup> This latter formulation appears to capture the essence of this proposal.

The final point to be made about this proposal is perhaps the most important. If it is adopted we should recognise that it fundamentally alters the regime encapsulated in Article 234. This is not an objection in and of itself, but we should nonetheless be cognisant of the change thereby entailed. In an appellate regime a lower court gives a decision on the entirety of the case which is binding on the parties, subject to the possibility of appeal. Appeal lies in the hands of the parties to the case, although it may be necessary to secure the leave of the court to undertake the appeal. In a reference system as presently conceived the national court gives no decision on the case or the question of EC law raised therein prior to making the reference to the ECJ. A question is referred to the ECJ and the final decision in the case will only be given by the national court once the answer to that question is forthcoming from the ECJ. The decision whether to refer will moreover be in the hands of the national court.

The proposal under consideration would in effect change the regime from a reference system to an appellate one. The national court would give a decision on all aspects of the

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77. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 26.

78. Case 314/85, *Firma Foto-Frost v. Hauptzollamt Lubeck-Ost*, 1987 E.C.R. 4199.

79. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 26.



case, and it would then be for the parties to "require" the national court to make a reference to the ECJ. It is not clear that the language of a "reference" would be suitable any longer in such a regime. The transformation of Article 234 entailed by this procedure was acknowledged in the Courts' paper.<sup>80</sup>

[S]uch a procedure would involve a fundamental change in the way in which the preliminary ruling system currently operates. Judicial co-operation between the national courts and the Court of Justice would be transformed into a hierarchical system, in which it would be for the parties to an action to decide whether to require the national court to make a reference to the Court of Justice, and in which the national court would be bound, depending on the circumstances, to revise its earlier judgment so as to bring it into line with a ruling by the Court of Justice. From the point of view of national procedural law this aspect of the system would doubtless raise problems which could not easily be resolved.

It might be thought in the light of the above that we should not persist any further with this option. We should nonetheless consider the advantages of such a transformation of the status quo. An appellate system is more characteristic of a developed federal or confederal legal system than is a reference system, and it could be argued that the EC is ready for such a change. National courts have become more familiar with EC law over the years and it may be time to move towards an appellate regime in which the national court gives judgment on the entirety of the case, subject to appeal to the ECJ. This may well be a desirable development. We should not however go down this road on the assumption that it will thereby limit the case-load of the ECJ. It will not do so for the reason given above: there will always be an incentive for the loser before the national court to appeal to the ECJ. However the move towards an appellate regime would make for greater flexibility in a crucial respect. We saw earlier that one of the perceived constraints of the reference system was what was termed the "one stop shop." The national court refers a question from a case which is still undecided and this has led many to believe that such a case can only be heard by one Community court because of the delays which would be involved if there was more than one adjudication at Community level. The shift towards an appellate system undermines this assumption. The national court has actually given judgment on the substance of the entire case, including the point of EC law involved therein. This would then open the possibility for references or appeals from such decisions to go initially to the CFI. We have already made the case for the CFI to be a general court of first instance in direct actions. It could now also act as the first instance court to hear appeals from national court decisions which arise under a modified Article 234. There would then be the prospect of appeal to the ECJ for cases which were of real importance. The judicial architecture of the Community would be coherent, and the ECJ could use its time for adjudication on the most deserving cases.

### *C. Conferral on the CFI of Jurisdiction to Give Preliminary Rulings*

At present all requests for a preliminary ruling go to the ECJ. One way therefore of easing the work-load of the ECJ would be to allow the CFI to give preliminary rulings. This would of course require an increase in the number of judges in the CFI, but, as we have already seen, there are fewer problems in increasing the number of judges in the CFI as compared to the ECJ. The possibility of conferring such jurisdiction on the CFI was

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80. *Id.* at 26.

canvassed positively, albeit cautiously, in the Courts' paper.<sup>81</sup> The Due Report was however opposed to this change, except in a limited number of special areas. Such rulings should, said the Report, be given by the ECJ because this was the most important task for the development of Community law. It was also felt that the "one stop shop" problem would mean that if such rulings were to be given by the CFI there would be no possibility of an appeal to the ECJ from the CFI's rulings.<sup>82</sup>

There is nonetheless much to be said for the idea that the CFI should be able to give preliminary rulings. Many of the cases which currently go to the ECJ for a preliminary ruling involve indirect challenges to the validity of Community norms where the non-privileged applicants cannot satisfy the standing criteria under Article 230. The substance of such cases are therefore concerned with just the kind of issues which would be heard by the CFI itself in a direct action under Article 230. It is therefore very difficult to argue that the CFI should not be able to hear the substance of such cases if they emerge indirectly via national courts as requests for preliminary rulings.

The more precise role of the CFI within a scheme of preliminary rulings would depend upon whether assignment of cases to it was coupled with one of the other reforms suggested above, or whether it occurred within the context of the more traditional Article 234 reference procedure. These will be considered in turn.

It would, as argued in the previous section, be possible to confer jurisdiction on the CFI to give rulings after a judgment on the case had been given by the national court. It would then be for one of the parties to the case to require the national court to refer the matter to a Community court. All such cases could initially be referred to the CFI which would give judgment, subject to appeal to the ECJ for cases raising points of particular importance. The CFI would, on this scenario, be the general first instance court for all types of case.

If however we preserve the more traditional reference procedure, whereby the national court refers a question of Community law prior to any judgment being given on the substance of the case, and the national court makes the decision whether to refer, then the role of the CFI might have to be somewhat different. This is because of the point made earlier, about the "one stop shop." If it is felt that there can only be one Community law adjudication under a traditional Article 234 reference system, and we desire some of these cases to be heard by the CFI, then there would have to be some method of allocating those cases which were to be heard by the ECJ and those which were to be heard by the CFI. Logically there are two ways in which this could be done. Either all requests for rulings could initially go to the ECJ which would then "delegate down" some of these cases to the CFI. Or all requests for rulings could initially go to the CFI which would "send up" to the ECJ those which were the most important. The former is likely to be more politically acceptable, with the ECJ making the determination as to which cases it should hear and which should go to the CFI.

A third possibility would be to retain the traditional reference procedure, send all requests for preliminary rulings to the CFI with the possibility of appeal or reference to the ECJ for those cases which are of particular importance, complexity or novelty. This would of course run counter to the "one stop shop" idea. The reason for nonetheless considering this possibility is that the Courts' paper itself countenances the prospect of two adjudications on preliminary rulings in the context of decentralised judicial bodies to be

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81. *Id.* at 27.

82. REPORT BY THE WORKING PARTY, *supra* note 2, at 22.

discussed below. If this is indeed felt to be possible then there is no reason why preliminary rulings could not go to the CFI with the possibility of further recourse to the ECJ.

#### *D. The Creation of Decentralised Judicial Bodies*

Another option for easing the ECJ's burden of preliminary rulings is to create in each Member State a judicial body responsible for dealing with such rulings from courts within their territorial jurisdiction. The Courts' paper leaves open the issue as to whether they should have the status of a Community or a national court.<sup>83</sup> The discussion in the Due Report is premised on the assumption that they would be national courts.<sup>84</sup>

Apart from easing the burden on the ECJ, this particular regime of decentralised courts is said to have the benefit of alleviating translation costs since it is assumed that the parties to the case will be from that country. A decentralised regime would also have the obvious advantage of bringing legal redress physically closer to citizens, who could obtain a preliminary ruling without the necessity of travelling to Luxembourg.

The Courts' paper and the Due Report are however concerned that such decentralised courts would jeopardise the uniformity of Community law.<sup>85</sup>

Any reorganisation of the preliminary ruling procedure on a national or regional basis, regardless of whether jurisdiction is conferred on national or Community courts, involves a serious risk of shattering the unity of Community law, which constitutes one of the cornerstones of the Union and which will become still more vital and vulnerable as a result of the enlargement of the Union. Jurisdiction to determine the final and binding interpretation of a Community rule, as well as the validity of that rule, should therefore be vested in a single court covering the whole of the Union.

The Due Report comes out against the creation of such bodies largely for this reason.<sup>86</sup> The Courts' paper gives greater consideration to this institutional development. To meet the concern set out above it suggests that there should be the possibility of a case going to the ECJ from one of the decentralised judicial bodies. The proposal appears to involve a mix of reference and appeal. Thus, the decentralised judicial body should have the power to refer a matter to the ECJ where the legal issue is of more general relevance for the unity or development of Community law. There should also be provision for "the possibility of appealing to the Court of Justice "on a point of general legal interest," in accordance with detailed procedures to be laid down, against preliminary rulings given by those bodies."<sup>87</sup>

The creation of some form of regional courts to supplement the existing judicial architecture of the Community has been advocated in the past.<sup>88</sup> It is also the case that the CFI has, in earlier reports, come out strongly against the establishment of such bodies, arguing that such a development would be of no relevance or interest to the Community and

83. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 28.

84. REPORT BY THE WORKING PARTY, *supra* note 2, at 20–21.

85. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 28; REPORT BY THE WORKING PARTY, *supra* note 2, at 21. See also THE ROLE AND FUTURE OF THE EUROPEAN COURT OF JUSTICE, A REPORT OF THE EC ADVISORY BOARD OF THE BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, CHAIRED BY THE RT. HON. THE LORD SLYNN OF HADLEY 101–04 (1996).

86. REPORT BY THE WORKING PARTY, *supra* note 2, at 21–22.

87. THE FUTURE OF THE JUDICIAL SYSTEM, *supra* note 1, at 28–29.

88. Jacque & Weiler, *On the Road to European Union—A New Judicial Architecture: An Agenda for the Intergovernmental Conference*, 27 C.M.L.R. 185 (1990).

would be extremely costly.<sup>89</sup> Any conclusion as the desirability or not of such decentralised bodies is dependent upon a number of issues which must be discussed separately.

It is important at the outset to decide whether such bodies will be part of the *national judiciary or whether they will be Community courts operating at a national or regional level*. This issue is left open in the Courts' paper. It is surely better that they should be Community courts. The only argument in favour of their being regarded as national courts is that the financial cost might then fall on the Member States rather than the EC. This consideration must be outweighed by other factors which are more important in the long term. Such courts should be regarded as Community courts since this best fits with the idea of building a developed Community judicial system below the ECJ, of the kind which exists within other countries such as the USA. It would be detrimental to begin this process of building a Community judicial hierarchy by placing these new courts within the national legal system, and this is so notwithstanding the fact that the national courts themselves are, as we have seen, Community courts in their own right in certain respects.

Closely allied to the matter just considered is the issue of whether the decentralised bodies should operate on a *national or regional level*. The Courts' paper is ambiguous in this respect. The primary impression which is given is that such courts will operate within each Member State. This impression is reinforced by the desire to save on translation costs, the assumption being that if the courts are organised on a national basis then all the proceedings can be in the national language. At other points the paper is framed in terms of reorganisation on a national or regional basis.

A regional form of organisation would be preferable for a number of reasons. In practical terms, it would almost certainly be more efficient, since a number of existing or future Member States would be too small to warrant such a court of their own. Translation costs would not be that high since many cases would still arise between litigants who were from the same Member State. It should nonetheless be recognised that there will still be translation costs irrespective of whether such courts are organised on a regional or national basis since the litigants will not always be from the same country. In normative terms, a regional regime is preferable to a national one since it obviates the dangers which could flow from the latter. If the decentralised courts were organised on a national basis, then there would be a danger that differences of view between such courts would be cast as the "German v. French view," or the "UK v. Italian" etc. This danger would be exacerbated if such courts were to be regarded as national rather than Community courts. This hazard would be avoided, or at the very least the tension would be much reduced, if the courts were to be organised regionally rather than nationally. In the USA, where a regional pattern of organisation exists, there are of course differences of view between the different circuits which cover the country. These are however cast in just such terms: the Fifth Circuit may, for example, be regarded as more liberal than the Second Circuit on a certain issue.

#### *E. The Relationship between Decentralised Judicial Bodies and the CFI*

Whether decentralised judicial bodies should be created depends in part upon the relationship between such bodies and the CFI. This is an interesting and difficult issue. The nature of this relationship cannot be divorced from other proposals concerning the judicial

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89. REPORT OF THE COURT OF JUSTICE ON CERTAIN ASPECTS OF THE APPLICATION OF THE TREATY ON EUROPEAN UNION—CONTRIBUTION OF THE COURT OF FIRST INSTANCE FOR THE PURPOSES OF THE 1996 INTERGOVERNMENTAL CONFERENCE (May 1995).

architecture of the Community which have been considered earlier. There are five possible ways in which to see this aspect of the judicial architecture of the Community developing.

1. An Appellate System with the CFI and no Decentralised Bodies

This discussion is based on the assumption that the reference system is transformed into a more appellate regime in the manner discussed earlier. National courts would be required to give judgment in cases raising matters of Community law and it would then be for a party to the case to request or require the national court to make a reference for a ruling on those points of Community law in respect of which that party contests the validity of the judgment given. If such a system were introduced then it would, as argued above, be possible and desirable for the CFI to become a general court of first instance, having initial jurisdiction not only over direct actions under Article 230, but also having jurisdiction over indirect actions which arise under a modified Article 234. There would then be the possibility of appeal to the ECJ where the point of law raised was of particular novelty, or importance for the development of EC law. If this were to occur it would be difficult to find a place for regional or decentralised courts, since the CFI would be taking indirect actions as well as direct actions.

2. An Appellate System with Decentralised Bodies and no CFI

The reference system could be transformed into an appellate regime in the manner considered above, with the possibility of further resort to the ECJ. The decentralised judicial bodies thus created would actually replace the CFI. It would be perfectly possible in theory to create such bodies and to vest them with jurisdiction over direct as well as indirect actions. On this view the CFI would cease to exist and its work would be re-assigned to the decentralised judicial bodies. This would have the advantage of bringing Community law closer to the citizen. It must however be recognised that there is little prospect of this occurring in practical terms. The CFI is well established and would fight vigorously for its survival.

3. A Traditional Reference System with the CFI and no Decentralised Bodies

This scenario is based on the assumption that we continue with a reference system of the general kind presently enshrined within Article 234, and that we do not transform it into a more appellate regime. There may well be some filter of the kind considered above, but this would not fundamentally change the nature of the Article 234 procedure in the way that a shift from a reference to an appeal system would. Preliminary rulings could go initially to the CFI, with the prospect of further recourse to the ECJ. The further recourse to the ECJ could then be by the same mixture of reference and appeal as proposed in the Courts' paper in relation to decentralised judicial bodies.

4. A Traditional Reference System with Decentralised Bodies and no CFI

This is the converse of the option just considered. On this view decentralised bodies would be created which would give preliminary rulings in the general manner presently enshrined in Article 234. There would be the possibility of further recourse to the ECJ

through the mixture of reference and appeal described above. The decentralised bodies would also be accorded jurisdiction over direct actions, and hence the CFI would cease to exist.

#### 5. Co-existence of the CFI and Decentralised Bodies

It would of course also be possible for there to be a place within the judicial architecture for both the CFI and decentralised judicial bodies. The CFI would have its present jurisdiction, or, as advocated earlier, it would become the general first instance court for all direct actions irrespective of the nature of the litigants in the case. The decentralised judicial bodies would hear preliminary rulings, with the prospect of further recourse to the ECJ.

An advantage of this model is that it achieves a blend between centralisation, as represented by the CFI, and decentralisation, as represented by the new national or regional bodies.

There are however two factors which point in the other direction. These should be borne in mind when thinking of future developments in this area.

In organisational terms, we should not create a further level of courts unless we are clear that it is necessary. It is, as we have seen above, not self-evident that we require both decentralised bodies and the CFI, and this is so irrespective of whether we persevere with a traditional-style reference system, or whether we transform it into a more appellate regime.

In substantive terms, we should not lose sight of the effect of the jurisdictional divide between the CFI and decentralised bodies entailed in the option presently under consideration. If indirect actions go to the decentralised bodies then they will often be passing judgment on the validity of Community norms in cases where non-privileged parties are unable to bring a direct action because of the inability to secure standing. It is, other things being equal, desirable that the CFI be able to hear such cases, more particularly if it is regarded as the general first instance court for the Community in the context of direct actions. A counter to this argument would of course be that if the ECJ and CFI defined the standing criteria for direct actions less restrictively then such cases would in any event come to them.

### X. THE INTER-GOVERNMENTAL CONFERENCE AND THE NICE TREATY

The Courts' paper and the Due Report both contain valuable analyses of the judicial architecture within the EC, and its possible future development. How far these suggestions were taken up was however dependent on the political will of the Member States, and other institutional actors, who took part in the IGC. This is self-evidently the case insofar as reforms require Treaty amendments. Judicial reform has not, in the past, been high on the agenda of IGCs. The very fact that the 1999–2000 IGC was concerned with the institutional implications of enlargement meant, however, that there was a greater likelihood of judicial reform being considered alongside reforms of the other major Community institutions. It is necessary to consider the discussions in the IGC in order to understand the changes adopted in the Nice Treaty.

### A. *The IGC*

What follows is based on the Feira European Council meeting.<sup>90</sup> The preliminary conclusions from this meeting drew heavily on an earlier note from the IGC Conference of Representatives of the Member States.<sup>91</sup> It is clear that all Member States accepted the need for judicial reform, and that they accepted also the need to allow for future changes to be made without going through the cumbersome process of Treaty amendment.<sup>92</sup>

In relation to the composition of the ECJ, almost all states agreed that the number of judges in plenary sessions should be limited in order that these did not become like an assembly, and that it should not be compulsory to have an Advocate-General's opinion in all cases. Most also agreed that there should continue to be one judge from each Member State on the ECJ.<sup>93</sup> New judicial boards of appeal should be created to deal with, for example, staff matters and trade marks, subject to appeal on points of law to the CFI.

There was fairly broad support, although not complete consensus, on changes to the respective jurisdictional competence of the ECJ and the CFI. There were however still significant issues to be resolved. This is readily apparent from the alternative formulations of the draft amendment to Article 225, which deals with the competence of the CFI. One formulation of draft Article 225(1) accorded the CFI power to hear classes of action to be defined in accordance with Article 225(3). The other accorded it power over classes of direct action referred to in the Treaty, with the exception of those that the Council, acting under 225(3), reserves for the ECJ. This latter formulation would clearly require the drawing up of a list of actions which are reserved for the exclusive competence of the ECJ.

The draft Article 225(2) was designed to give the CFI power to hear questions referred for preliminary rulings in certain specified areas. This power might be subject to the proviso that if the ECJ believed that a case within such an area raised an issue of general importance for EC law, then the ECJ would itself give the ruling. An alternative proviso was that such decisions made by the CFI would be subject to review by the ECJ, on terms to be laid down in the Statute of the Court.

The draft Article 225(3) provided that the Council, acting unanimously at the request of the ECJ, after consulting the EP and the Commission, or possibly at the request of the Commission after consulting the EP and the ECJ, should determine the classes of action referred to in Article 225(1) and the areas in which the CFI could make preliminary rulings pursuant to Article 225(2).

### B. *The Nice Treaty*

The reforms actually adopted in the Nice Treaty built on the discussion which had taken place in the IGC. The main changes are as follows.

The Nice Treaty has modified the composition and structure of the court system in a number of ways. It has been decided that the ECJ shall consist of one judge from each

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90. INTERGOVERNMENTAL CONFERENCE ON INSTITUTIONAL REFORM, PRESIDENCY REPORT TO THE FEIRA EUROPEAN COUNCIL (June 2000) [hereinafter INTERGOVERNMENTAL CONFERENCE ON INSTITUTIONAL REFORM].

91. CONFERENCE OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES, FRIENDS OF THE PRESIDENCY GROUP (COURT OF JUSTICE AND COURT OF FIRST INSTANCE) (May 2000).

92. INTERGOVERNMENTAL CONFERENCE ON INSTITUTIONAL REFORM, *supra* note 90, at 39.

93. *Id.* at 40.

state.<sup>94</sup> This had been the practice hitherto, but there was no Treaty provision requiring this to be so. The dangers of the ECJ becoming too unwieldy, and crossing the line from a court to a deliberative assembly, were felt to be outweighed by the importance of having one judge from each state. Time will tell whether this was a wise move or not. The role of the Advocate General has been subtly altered by the amendments made to Article 222. This now provides that the Advocate General shall make reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his or her involvement.<sup>95</sup> The composition of the CFI has also been modified. There is to be at least one judge from each Member State.<sup>96</sup> This has always been the case, but it was not mandated by the Treaty itself. We have already seen that the composition of the CFI is less problematic than that of the ECJ. The Nice Treaty provides, in addition, for judicial panels to take certain cases, such as those between Community and its servants.<sup>97</sup> A further structural reform which will be welcomed by members of both courts, is that their respective Rules of Procedure can be adopted by qualified majority in the Council, unanimity no longer being required.<sup>98</sup>

The Nice Treaty has also made a number of changes to the jurisdiction of the Community courts. The position until now had been that the CFI would be accorded jurisdiction over certain classes of case as a result of a determination made by the Council, albeit at the request of the ECJ. This was subject to the Treaty limitation that the CFI could not hear preliminary rulings. The Nice Treaty has modified Article 225. In Article 225(1) it is now provided in the Treaty itself that the CFI can hear actions covered by Articles 230, 232, 235, 236, and 238, with the exception of those cases assigned to a judicial panel and those reserved in the Statute for the ECJ itself.<sup>99</sup> Article 51 of the Statute makes it clear that the CFI will not have jurisdiction in direct actions brought by the Community institutions, the ECB or the Member States. These cases will continue to go to the ECJ. Article 225(1) stipulates further that the Statute may provide for the CFI to have jurisdiction for other classes of case. The judicial panels created pursuant to the Nice Treaty can be reviewed by the CFI, subject to a limited right of review by the ECJ in exceptional instances.<sup>100</sup> Article 225(3) accords the CFI power for the first time to hear preliminary rulings in specific areas laid down by the Statute of the Court of Justice.<sup>101</sup> Where the CFI believes that the case requires a decision of principle which is likely to affect the unity or consistency of Community law, it may refer the case to the ECJ.<sup>102</sup> Preliminary rulings given by the CFI can, exceptionally, be subject to review by the ECJ, under the conditions laid down in the Statute, where there is a serious risk to the unity or consistency of Community law being affected.<sup>103</sup> A Declaration has been attached to the modified Article 225 urging the ECJ and the Commission to give overall consideration to the division of competence between the ECJ and CFI, and to submit proposals as soon as the revised treaty enters into force.<sup>104</sup> There are further Declarations concerning the nature of the review procedure which is to

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94. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, AS AMENDED BY THE TREATY OF NICE, Feb. 26, 2001, art. 221, O.J. (C 80) 1 (2001), available at [http://europa.eu.int/eur-lex/en/treaties/dat/nice\\_treaty\\_en.pdf](http://europa.eu.int/eur-lex/en/treaties/dat/nice_treaty_en.pdf).

95. *Id.* art. 222.

96. *Id.* art. 224, para. 1.

97. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, AS AMENDED BY THE TREATY OF NICE, Feb. 26, 2001, art. 225a, O.J. (C 80) 1 (2001), available at [http://europa.eu.int/eur-lex/en/treaties/dat/nice\\_treaty\\_en.pdf](http://europa.eu.int/eur-lex/en/treaties/dat/nice_treaty_en.pdf).

98. *Id.* arts. 223 para. 6, 224 para. 6.

99. *Id.* art. 225(1).

100. *Id.* art. 225(2).

101. *Id.* art. 225(3).

102. *Id.* art. 225(3) para. 2.

103. *Id.* art. 225(3) para. 3; Protocol on the Statute of the Court of Justice, TREATY OF NICE, Feb. 26, 2001, art. 62, O.J. (C 80) 1, 65 (2001).

104. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, AS AMENDED BY THE TREATY OF NICE, Feb. 26, 2001, Declaration on Article 225 of the Treaty Establishing the European Community, O.J. (C 80) 1, 79 (2001).



operate under Articles 225(2) and 225(3), the practical operation of which is to be evaluated after three years.<sup>105</sup>

## XI. CONCLUSION

The Courts' paper and the Due Report are to be welcomed for their willingness to canvass a range of options which have a profound effect on the future shape of the Community's judicial architecture. While all of the issues raised are of interest, two matters are particularly important for the future shape of the Community judiciary. The Nice Treaty now provides some answers on these issues.

The first is whether the CFI is to be allowed to mature as the general first instance court at least for direct actions. The answer to this is unclear. Direct actions brought by Community institutions, Member States, and the ECB will continue to be heard by the ECJ. There may however be some re-thinking of this in the future, given that the Declaration on Article 225 urges the ECJ and Commission to give overall consideration to the division of competence between ECJ and CFI "in particular in the area of direct actions."

The second crucial issue is whether the CFI should be given any jurisdiction over preliminary rulings. The Nice Treaty has provided an affirmative answer on this point. The significance of this change, will, however depend on the classes of case over which the CFI is given jurisdiction to hear preliminary rulings.

A number of the broader issues raised in the previous discussion have not been taken up in the Nice Treaty. These include the possibility of shifting from a reference to an appellate system, and the establishment of decentralised, regional courts. It would however be wrong to conclude that the Nice Treaty has failed in reform of the judicial architecture. Discussion as to the possibilities of reform prior to revision, is almost always wider-ranging than the reforms undertaken when the Treaty is actually revised. When viewed in this light, the judicial reforms embodied in the Nice Treaty are significant. These provisions, in particular the revised Article 225, allow further reform to be undertaken through amendment of the Court's Statute. The very fact that the IGC appended the Declaration encouraging the ECJ and Commission to give overall consideration as soon as possible to the division of competence between the ECJ and CFI, is indicative of the fact that the door to further reform in this area remains open.

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105. *Id.* at 79–80.